UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

CALYER ARCHITECTURAL WOODWORKING, INC.

Employer

and Case No. 29-RC-9792

NEW YORK CITY DISTRICT COUNCIL OF CARPENTERS, UNITED BROTHERHOOD OF CARPETERS AND JOINERS OF AMERICA, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, herein called the Act, as amended, a hearing was held before Rachel Zweighaft, a Hearing Officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and hereby are affirmed.

2. Calyer Architectural Woodworking, Inc., herein called the Employer, a domestic corporation with an office and place of business located at 325 Calyer Street, Brooklyn, New York, is engaged in the manufacture of architectural woodworking.

During the past year, which period is representative of its operations generally, the Employer, in the course and conduct of its business operations, performed services valued in excess of $50,000 to customers located within the State of New York, said customers satisfying several of the Board's direct tests for the assertion of jurisdiction.[1]

Based upon the stipulation of the parties, and the record as a whole, I find that the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved herein claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The Petitioner seeks to represent a unit consisting of all employees employed by the Employer, including machine men/foremen, bench men and office clerical employees. It appears from the record that the Employer's sole dispute is with the inclusion of machine men/foremen in the bargaining unit. While the Employer did not specifically contend that this classification is supervisory, as required under *Bennett Industries*, 313 NLRB 1363 (1994), it appears from the record that the Employer is taking this position. Notwithstanding the Employer's failure to assert such a position, that issue is addressed herein. The Employer did not raise any other issue bearing on the appropriateness of the unit sought. For the reasons set forth below, I find that the

[1] The parties initially were unable to stipulate that the Employer met a Board test for the assertion of jurisdiction. Following the close of the record, however, the parties executed a written stipulation in this regard. That stipulation has now been received as Joint Exhibit 1.

Employer's machine men/foremen are not supervisors within the meaning of Section 2(11) of the Act and that the wall to wall unit sought by the Petitioner is appropriate for the purposes of collective bargaining.

The burden of proving that an employee is a statutory supervisor is on the party alleging such status. *Kentucky River Community Care, Inc*., 232 NLRB No. 209 (1997)*, enf. den. in part and granted in part,* 193 F.3d 444, 162 LRRM 2449 (6th Cir. 1999), *cert. granted*, 530 U.S. 1304, 121 S.Ct. 27 (2000), *aff'd in part and rev'd in part*, 121 S.Ct. 1861, 167 LRRM 2164 (May 29, 2001). In light of the exclusion of supervisors from the protection of the Act, this burden is a heavy one. *See Chicago Metallic,* 273 NLRB 1677, 1688, 1689 (1985); *see also Boston Medical Center Corporation*, 330 NLRB No. 30 at 83 (1999). It can not be satisfied merely by making "general, conclusory claims" that an alleged supervisor has the power to exercise the supervisory indicia enumerated in the statute. *Crittenton Hospital*, 328 NLRB No. 120 at 1 (1999). "Paper authority," such as a written job description, is insufficient proof of supervisory status. *Crittenton*, 328 NLRB No. 120 at 1; *see also Brusco Tug and Barge Co.,* 247 F.3d 273, 276 (D.C. Cir. 2001). Since "the issue of supervisory status is heavily fact-dependent and job duties vary, per se rules designating certain classes of jobs as always or never supervisory are generally inappropriate." *Brusco*, 247 F.3d at 276 (citing *Kentucky River*, 193 F.3d at 453).

In enacting Section 2(11) of the Act, "Congress distinguished between true supervisors who are vested with 'genuine management prerogatives,' and 'straw bosses, lead men, and set-up men' who are protected by the Act even though they perform 'minor

supervisory duties.'" *S. Rep. No. 105, 80th Cong., 1st Sess., 4 (1947), quoted in Providence Hospital,* 320 NLRB 717, 725 (1996). Section 2(11) of the Act provides:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Thus, the statutory definition set forth in Section 2(11) "sets forth a three-part test for determining supervisory status. Employees are statutory supervisors if (1) they hold the authority to engage in any 1 of the 12 listed supervisory functions, (2) their 'exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment,' and (3) their authority is held 'in the interest of the employer.'" *E.g., Kentucky River*, 121 S.Ct. at 1867.

In determining whether the authority to "assign" employees is supervisory, the Board must assess whether it "requires the use of independent judgment." Proof of independent judgment in the assignment of employees entails the submission of concrete evidence showing how assignment decisions are made. E.g., *Crittenton Hospital*, 328 NLRB No. 120 (1999). The assignment of tasks in accordance with an Employer's set practice, pattern or parameters, or based on such obvious factors as whether an employee's workload is light, does not require a sufficient exercise of independent judgment to satisfy the statutory definition. *See Express Messenger Systems*, 301 NLRB 651, 654 (1991); *Bay Area-Los Angeles Express*, 275 NLRB 1063, 1075 (1985). The Board and federal courts "typically consider assignment based on assessment of a

worker's skills to require independent judgment and, therefore, to be supervisory," except where the "matching of skills to requirements [is] essentially routine." *Brusco*, 247 F.3d at 278 (citing *Hilliard Development Corp*., 187 F.3d 133, 146, 161 LRRM 2966 (1st Cir. 1999)).

With regard to discipline, the power to "point out and correct deficiencies" in the job performance of other employees "does not establish the authority to discipline." *Crittenton Hospital*, 328 NLRB No. 120 at 2 (citing *Passavant Health Center*, 284 NLRB 887, 889 (1987). Writing reports on incidents of employee misconduct is not a supervisory function if the reports do not always lead to discipline, and do not contain disciplinary recommendations. *Schnurmacher,* 214 F.3d at 265 (citing *Meenan Oil Co*., 139 F.3d 311 (2nd Cir. 1998); *Ten Broeck Commons*, 320 NLRB 806, 812 (1996); *Illinois Veterans Home at Anna L.P*., 323 NLRB 890 (1997).

In the instant case, the Employer failed to establish that the machine man is a supervisor. The sole witness to testify at the hearing was Walter Clayton, who was employed by the Employer as a machine man/foreman for 3 ½ days prior to his discharge in mid-February, 2002. Clayton began by describing the Employer's overall operation, explaining that architectural woodworking involves the manufacture of costly wood furniture and cabinetry using woods such as oak, mahogany and ash. During his brief tenure with the Employer, the employee complement consisted of two bench men, one office clerical employee and one machine man/foreman (Clayton himself). The record does not reveal whether the Employer has hired a replacement for Clayton to date.

Clayton stated that as machine man/foreman, he was provided with a complex drawing of the item to be built, from which he would make a cutting list of all necessary

parts. He would then cut all the parts, including tongue and groove joinery, mitering and edge banding. It appears from the record that this work occupies virtually all of the machineman/foreman's worktime. Next, he would give the parts to the two bench men. The bench men would then assemble the unit. According to Clayton, bench men do all the sanding, glass insertion and final assembly.

The record further reflects that the office clerical spends a substantial portion of her work day interacting with the employees in the production room. She regularly brings plans to the machine man for implementation and conveys messages from architects to the workers. The clerical employee's responsibilities also include answering the telephone, payroll, inventory, faxing and photocopying. It appears that she often accompanies Reno Buschemi, the Employer's owner, to the shop floor, where Buschemi spends more than half of his day.

With regard to the machine men/foremen's alleged supervisory authority, Clayton testified that when he held this position, he did not have the ability or authority to discipline employees, to hire or fire them, to grant time off, or to make recommendations to Buschemi, the owner of the company, regarding matters such as discipline, hiring or firing. There is no evidence that he had the authority to exercise any of the other supervisory indicia set forth in Section 2(11) of the Act.. Thus, Clayton maintained that he was never present at interviews of other employees. He was not expected to give his opinion on the skill levels of benchmen or trainees nor was it ever solicited.

Clayton testified that both he and the bench men reported directly to Buschemi, who "barked out orders," granted time off and resolved any problems the employees might have. Clayton gave out the work to the benchmen after he had cut the parts, and he

made sure that the assembly work was done properly. However, on the one occasion that he told Buschemi that the benchmen were performing work incorrectly, Buschemi disregarded Clayton's opinion. At times, Buschemi would tell Clayton that he was supposed to be "watching" the other employees, but there is no evidence that this "watching" involved the exercise of any supervisory indicia. Moreover, in light of the safety hazards of looking away from a moving cutting machine, Clayton testified that it was not feasible for him to "watch" the other employees.

Buschemi also asked Clayton to try to teach the other employees, and the bench men sometimes asked him questions about the assembly operation. Although Clayton would suggest better or faster ways to perform their work, the benchmen were not required to follow his suggestions. Similarly, although Clayton answered "yes" when asked whether he determined which job would be performed by which benchmen, the record did not reflect how such determinations were made, or whether they required independent judgment involving the relative skill levels of these two employees.

Thus, the record does not demonstrate that the Employer's /foremen are supervisors. There is some evidence that Clayton assigned work to other employees when he held this position, but there is no evidence that he used independent judgment in doing so, or that he exercised any other supervisory indicia. Accordingly, I find that the machineman/foreman is not a statutory supervisory within the meaning of Act and therefore that classification is properly included in the bargaining unit.

In view of the foregoing, I find that the following wall to wall unit is appropriate for the purposes of collective bargaining:

All full-time and regular part-time employees employed by the Employer including machinemen/foremen, benchmen and office clericals, at the Employer's facility located at 325 Calyer Street, Brooklyn, New York, excluding guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently subject to the Board's Rules and Regulations. Eligible to vote are employees in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike that commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States who are employed in the unit may vote if they appear in person or at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible to vote shall vote whether or not they desire to be represented for collective bargaining purposes by New York City District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL-CIO.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc*., 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, four (4) copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB No. 50 (1994). In order to be timely filed, such list must be received in the Regional Office, One MetroTech Center North-10th Floor (Corner of Jay Street and Myrtle Avenue), Brooklyn, New York 11201 on or before March 12, 2002. No extension of time to file the list may be granted, nor shall the filing of a request for review operate to stay the filing of such list except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

NOTICES OF ELECTION

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional office at least five working days prior to 12:01 a.m. of the day of the election that it has not received the notices. *Club*

Demonstration Services, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by March 20, 2002.

Dated at Brooklyn, New York, March 6, 2002.

/s/ Alvin P. Blyer
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